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IN THE

Supreme Court of the United States

OCTOBER TERM

No. [redacted] 5

HENRY H. WOODRING, SECRETARY OF WAR, AND E. A. S. SMITH, GENERAL, PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, *Petitioners*,

v.

JOSEPH S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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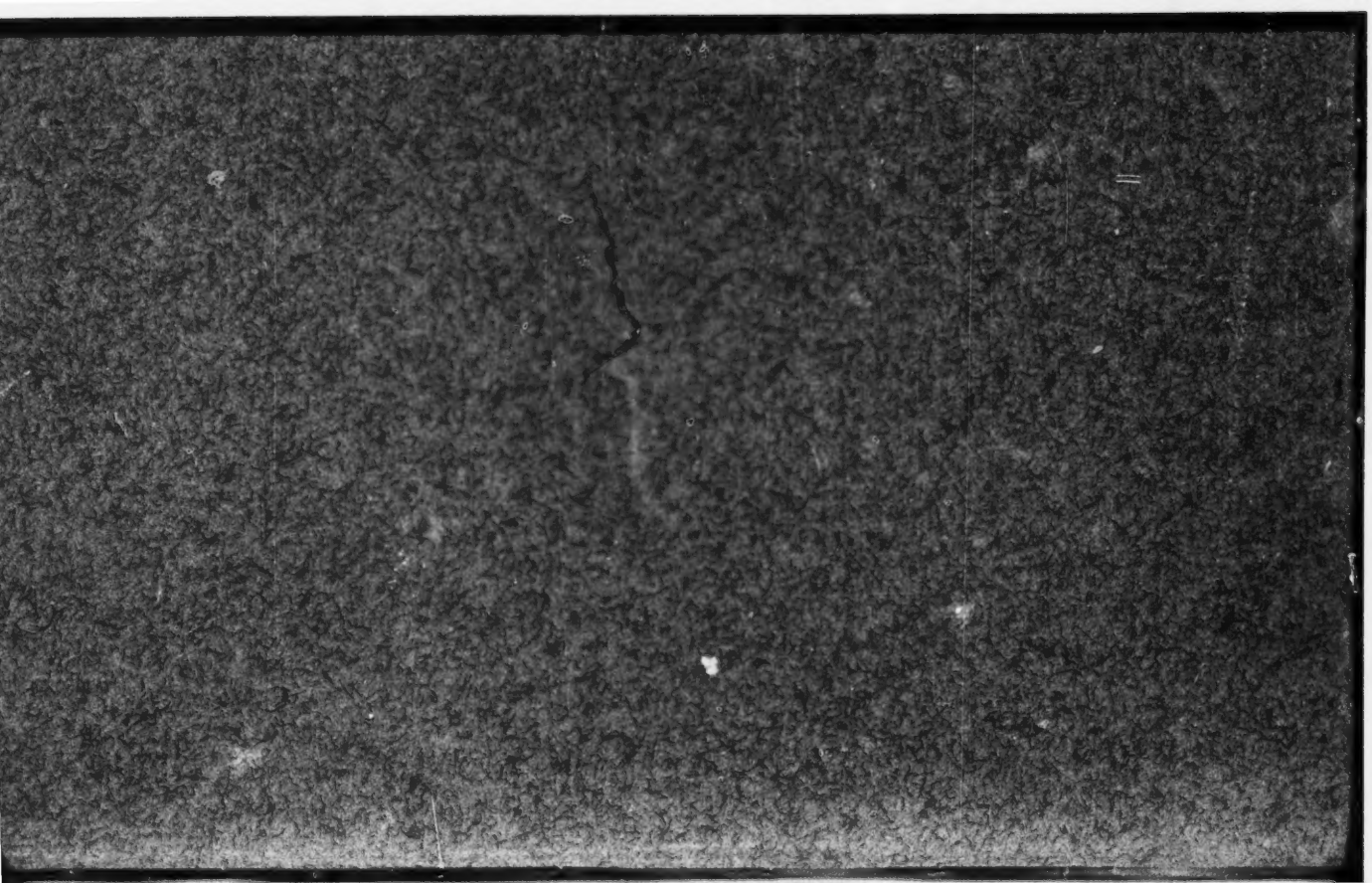

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v.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C., *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW AND JURISDICTION OF THE COURT.

The judgment of the District Court was entered without an opinion (R. 23). The opinion of the United States Court of Appeals for the District of Columbia (R. 26) is reported in 100 Fed. (2d) 690, which opinion adopts the opinion in the case of *Inland Waterways Corporation, et al.*, v. *Hardee*, 100 Fed. (2d) 678. The reference to the statute under which the jurisdiction of this Court is invoked (pet. p. 3) is correct.

QUESTIONS PRESENTED.

As a preliminary to stating the issues of law presented by the petition, petitioner makes a summary of the case which is the starting point for certain erroneous conclusions reached later in the petition. The District National Bank of Washington, D. C., the Receiver of which is respondent here, prior to its insolvency in 1933, received as deposits not merely "funds of the Canal Zone, principally derived from its Postal Service" (pet. p. 2), but specifically deposits "almost entirely composed of moneys received by the Postal Service of the Canal Zone," which "consisted of deposit money order funds and money order funds." (R. 14) The distinction will be shown later to be important. Such funds were deposited by the Secretary of War in the District National Bank under an agreement by which specified bonds belonging to the bank were deposited with an agent of the Secretary of War to secure the deposit. After the insolvency of the bank and the appointment of a Receiver, the bonds securing the deposits were sold and the proceeds of such sale of bonds were paid to the Secretary of War by the setting up of a deposit account in the Hamilton National Bank of Washington, D. C., in the name of "Secretary of War Canal Zone funds." (R. 2, 3, 13.) Admittedly, the funds deposited in the District National Bank before closing, that is the so-called Panama Canal funds, were not public money of the United States and were not part of the revenue of the United States and were not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect to public money of the United States. (R. 20) The Receiver, respondent here, assailed the validity of the agreement to give security as being *ultra vires* of the bank and void and the payment of the deposit in full as being illegal and in violation of the National Bank Act, as constituting a preference over other depositors and brought this suit to recover the proceeds of the security to the extent that such proceeds exceeded

the dividends paid to general depositors. (50 per cent at the time of bringing suit) (R. 4); more now.

STATEMENT.

The "statement" in the petition (pp. 3, 4, 5), so far as it goes, sets forth correctly the facts in connection with the making of the deposits, the pledge of the assets of the bank to secure the deposits, subsequent sale of the pledged assets, the bringing of the suit in the District Court, and the decree there entered in favor of respondent, and its affirmation by the United States Court of Appeals for the District of Columbia.

In addition to the facts stated by petitioner, additional facts are shown by the record which have a bearing upon the granting or denial of the petition, namely:

1. The complaint averred (R. 3) and the answer specifically admitted (R. 13) that the proceeds of the pledged securities were, after the closing of the bank, paid to the Secretary of War by the setting up of a deposit account in the Hamilton National Bank of Washington, D. C., in the name of "Secretary of War Canal Zone funds."

2. The complaint averred (R. 6) and the court below held (100 Fed. (2d) 678, 689, 690), and the petition admits, that the proceeds of the sale of the pledged securities have not been covered into the Treasury of the United States or the Treasury of any State, Territory or other government, and the proceeds of the pledge sought to be recovered do not belong to the United States, nor is there any law under which they could be covered into the Treasury of the United States (100 Fed. (2d) 689).

Additional facts shown by the record will be mentioned in the course of the argument.

REASONS FOR DENYING CERTIORARI.

The petition raises no novel question nor is it shown that the decision of the court below is in conflict with any decision of this Court, or of any United States Circuit Court of Appeals.

The arguments advanced as reasons for granting certiorari represent merely an effort to reverse principles of law definitely settled by the decisions of this Court in *Texas and Pacific Ry.* v. *Pottorff,* 291 U. S. 245; *Marion* v. *Sneeden,* 291 U. S. 262; *Lewis* v. *Fidelity and Deposit Co. of Maryland,* 292 U. S. 559, and in a long list of cases in the various Circuit Courts of Appeal in which this Court has so consistently denied certiorari that it apparently considers the questions settled. None of the questions raised by petitioners can be considered as novel, nor have the petitioners pointed to any conflict in the decision of the court below in the instant case with any of the decisions of this Court, or with the decisions of the various Circuits. Hence, under the rules and decisions of this Court governing the granting of certiorari, no compelling reasons are advanced in the petition for granting the writ.

While petitioner urges a number of specifications of error, only the following were stressed in the petition:

1. (p. 7) "In holding the suit not one against the United States, and in failing to regard the United States as an indispensable party, the court below failed properly to apply the decisions of this Court."

2. a (p. 14) "In holding invalid the securing of the Canal Zone's deposit, the court below decided in a way contrary to the long settled administrative practice an important question of banking law affecting many agencies, which ought to be decided by this Court."

2. b (p. 16) "In addition the court below erred in failing to find a specific authority in the Secretary of War to enter into a contract requiring the District National Bank to se-

cure deposits of Panama Canal money, particularly as applied to the deposits in this case, which were almost entirely composed of money order funds and deposit money order funds received in the Canal Zone Postal Service."

(In a footnote to the petition (p. 3), it is stated that if certiorari is granted, it is proposed to consider also the question whether, if the deposit was invalid under R. S. Sec. 5497, the bank became a trustee *ex maleficio* of the funds here involved. No facts are stated either in the complaint or answer which furnish a basis for consideration of such question, the assignment of errors on appeal raised no such question, it was not argued orally or on briefs below, and neither the trial court nor the court below considered such question.)

Inasmuch as the court below first discussed the questions raised in points 2. a and 2. b, just mentioned, having to do with the illegality of the pledges and the effect of the decision in *O'Connor* v. *Rhodes,* 79 Fed. (2) 146, such points will be discussed first here, followed by a discussion of point 1 as to the United States being an indispensable party.

The pledges involved were absolutely void and any effort to make them effective constitutes an illegal preference over other depositors of the bank.

All arguments in this case come back to the fundamental principles established and reiterated by this Court that the power to pledge assets is not necessary to deposit banking, that to permit such pledges is inconsistent with many provisions of the National Bank Act which are designed to insure in case of disaster uniformity in the treatment of depositors and a ratable distribution of assets, that even the United States Government is not entitled to a preference in the event of the insolvency of a national bank (*Cook County National Bank* v. *U. S.,* 107 U. S. 445) and that no deposits in national banks, public or private, may be legally secured unless Congress, which incorporated na-

tional banks, has specifically authorized the securing of specific public funds.

Prior to 1934, when this Court decided *Texas and Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, a contrary view prevailed generally and most of the argument contained in the present petition reflect that prior view, but this Court in the *Pottorff* case decided that:

> "National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied."

On the same day in *Marion* v. *Sneeden*, this Court decided similarly that national banks lack power to pledge their assets to secure any public deposits except those specifically authorized by Congress, saying:

> "For the reasons stated in Texas and Pacific Railway Co. v. Pottorff, decided this day, *ante*, p. 245, we are of opinion that the Act of 1864, did not confer the power to pledge assets to secure any public deposits except those made under Section 45 by the Secretary of the Treasury of the United States."

The Court then emphasized the specific nature of its decision by holding:

> "The power conferred by each later act except that of 1930 was limited to securing specific Federal funds."

The petition characterizes the above language of this Court as dictum but, we respectfully submit, the language quoted was necessary to a determination of what public deposits could be secured legally and, further, the effect of the language has not been departed from since either in this court or in any Circuit Court of Appeals although numerous cases involving the point have been decided below and certiorari sought here.

For example in *Lewis* v. *Fidelity and Deposit Co.*, 292 U. S. 559, this Court said (p. 564):

> "In *Texas and Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

The same rule has been followed by the court below both in the instant case and in *O'Connor* v. *Rhodes*, 79 Fed. (2d) 146, certiorari denied, except as to one minor point, in 296 U. S. 568. The same rule has been followed by all of the Circuit Courts of Appeal in which the question has been presented and certiorari has been consistently denied by this Court.

Leonard v. *Gage*, 94 Fed. (2d) 19, cert. den. 82 L. Ed. Ad. Op. 641.
Hood v. *Hardesty*, 94 Fed. (2d) 26, cert. den. 82 L. Ed. Ad. Op. 748.
City of Ft. Worth v. *McCamey*, 93 Fed. (2d) 964, cert. den. 82 L. Ed. Ad. Op. 1038.
City of Chicago v. *Joseph*, 95 Fed. (2d) 444, cert. den. 82 L. Ed. Ad. Op. 1043.
Granzow v. *Village of Lyons*, 89 Fed. (2d) 83.
Redfield-Independent School District v. *Schnetzer*, 94 Fed. (2d) 257.
LaParr v. *City of Rockford*, (C. C. A.) —— Fed. (2d) ——.
Griffin v. *Royall*, 70 Fed. (2d) 103.

Neither custom nor long settled administrative practice can give validity to the pledges.

The petition urges in point 2 a (p. 4) that the decision of the court below holding invalid the securing of the funds here involved was contrary to a long settled administrative practice and involved an important question of banking law affecting many agencies, which ought to be decided by this Court.

The advancement of this argument overlooks the underlying basis of the decisions of this Court in the *Pottorff* and *Sneeden* cases, namely, as stated in the *Pottorff* case, that:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. California Nat. Bank v. Kennedy, 167 U. S. 362; McCormick v. Market Nat. Bank, 165 U. S. 538; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24."

In the last cited case, namely, the Pullman's Palace Car Co., this Court said (at p. 59):

> "A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In addition, the precise point that custom and usage or long settled administrative practice justifies a reversal of the decision of the court below has been decided contrary to the contention of petitioner by this Court in the *City of Marion* v. *Sneeden, supra,* and in the following decisions of the various Circuit Courts of Appeal:

> *City of Fort Worth* v. *McCamey,* 93 Fed. (2d) 964.
> *Leonard* v. *Gage and Elliott,* 94 Fed. (2d) 19, cert. den. 82 L. Ed. Adv. Op. 641

Maxwell and Porter, et al. v. *Tarrant County Water Control and Improvement District,* Nos. 650 and 645 in Equity, the District Court of the United States for the Northern District of Texas, Fort Worth Division.

The pledges were not made in conformity with R. S. Sec. 5153, 12 U. S. C. Sec. 90 (Printed at p. 19 of the petition.)

Admittedly, the provisions of R. S., Sec. 5153 (12 U. S. C., Sec. 90) were not followed in making and securing the deposits here involved. Summarized, that section provides that for public money to be legally secured, the following requirements must be met: (a) The banks in which the deposits are made must be designated for that purpose by the Secretary of the Treasury; (b) the money deposited must be public money; (c) the deposit must be made by the direction of the Secretary of the Treasury; and (d) the pledge shall be required by the Secretary. The record is undisputed that the bank was not a depository designated by the Secretary of the Treasury, also that the deposits were not made by the Secretary of the Treasury, but by the Secretary of War; the record is also clear that the pledges were not exacted by the Secretary of the Treasury, nor were the pledge contracts made with him, and that the Secretary of the Treasury had no control whatever over the deposits or over the pledged securities. The record is also clear that the funds deposited were not public moneys (R. 20) and it is specifically admitted in the petition (p. 10) that "the fund represents money received by the Canal Zone Postal Service from private parties" and further the petition admits (p. 16) that the funds "were almost entirely composed of money order funds and deposit money order funds received by the Canal Zone Postal Service."

(The distinction between money order funds and regular postal funds and postal savings funds is pointed out below.)

The effect of R. S. Sec. 5153 (Sec. 90 Title 12 U. S. C.), is discussed in detail in *O'Connor* v. *Rhodes, supra,* beginning at page 149, and this Court denied certiorari in that case except as to one minor point, in 296 U. S. 568.

It is argued in the petition (p. 14) that it was the congressional intent to protect all deposits of public moneys, but the answer of petitioner specifically admits that the funds here involved were not public moneys (R. 20) and it was held in *Coudert* v. *U. S.*, 175 U. S. 178, that this section (R. S. Sec. 5153) has relation only to public money of the United States, public money being defined to be the revenues of the United States from all sources covered into the Treasury.

In addition, respondent suggests that the requirements of R. S. Sec. 5153 are not mere technical requirements since they are coupled (pet. p. 19) with additional requirements that the pledges required under such section by the Secretary of the Treasury are designed not only to make safe the deposits of public money, but also to insure the faithful performance of the duties of designated banks as financial agents of the government, and since they are also coupled with the requirement that the Secretary of the Treasury each year shall make a public statement of the securities required during that year for such deposits. None of such requirements were met in the instant case thus emphasizing that the deposits here in question were not secured under R. S. Sec. 5153.

When the admitted facts are analyzed in the light of the statute, it becomes apparent that the court below was correct in holding that these pledges could not be considered as being authorized under R. S. Sec. 5153.

There is no statutory authority for the pledging of assets to the Secretary of War or to any official with respect to the deposit of money order funds from the Canal Zone.

In addition to the contentions previously discussed, it is argued by petitioner that circulars, regulations and acts of the Canal Zone, coupled with acts of Congress relating to the Government of the Canal Zone, can be construed as authorizing the pledge of assets to secure such Canal Zone deposits. An examination of these various enactments show that they fall far short of the necessary statutory authorization required in view of the *Pottorff* and *Sneeden* decisions. The opinion of the court below contains a complete analysis of the various orders, regulations and statutes involved and holds that authority for the pledge can not be correctly read into these various enactments. The court below in harmony with the decision of this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, found a complete absence of any Act of Congress specifically authorizing these pledges.

Petitioner refers (p. 17) to "'circular No. 660-2," issued from the Governor of the Canal Zone on April 1, 1914, which is not in the record and was not mentioned by the petitioner in his brief below, but which apparently is a circular of the accounting department of the Canal Zone. He contends that the provisions of this circular when considered with the Act of Congress of August 21, 1916, must be considered as specific authority for the pledge. The fallacy of this argument lies in the interpretation given to the circular itself and to the Congressional Act. The circular related to contracts that had been entered into by the Secretary of War under an assumption that national banks had power to secure deposits such as those relating to Canal Zone funds, and is no more than a direction to accounting officials to deposit in banks with which such contracts were had. This falls far short of a legal requirement for the taking of security. It simply recognizes an existing condi-

tion and does not bring into existence any requirement that deposits of Canal Zone funds must be secured. Nor does the 1916 Act of Congress undertake or require the giving of security in connection with such deposits. By its terms it relates to the disposition of interest paid on account of such deposits. Thus, the contention that the circular plus the Act of Congress, when read together, constituted a specific statutory requirement, is without foundation.

Examination of the executive orders of the President of the United States with respect to the Canal Zone, of the Treaties and Acts of Congress relating to the Panama Canal and of the laws of the Canal Zone shows that none of them contains any reference to the securing of deposits made by the Canal Zone or in its behalf in national banks in the United States or indeed in any banks. On June 19, 1934, there was approved by the Congress a "Canal Zone Act" (U. S. Govt. Printing Office: 1934), containing in codified form "all the laws relating to or applying in the Canal Zone, except such general laws of the United States as relate to or apply in the Canal Zone." The preface to this Canal Zone Code states that "the material included in the code has its source in acts of Congress, in certain acts and ordinances of the former Isthmian Canal Commission which were ratified and confirmed as valid and binding by Congress in the Panama Canal Act of 1912, and, in a limited number of sections, in Executive orders of the President which were likewise ratified and confirmed by Congress." The appendix also contains in addition "treaties and general laws of the United States applicable in or relating to the Canal Zone or the Panama Canal."

An examination of this Canal Zone Code shows that it contains no provision whatever requiring the securing of Canal Zone funds, money order or otherwise, deposited in national banks in the United States.

It is submitted that a mere "circular" apparently of the Governor of the Panama Canal Zone, not approved by the Secretary of War or the President of the United States, and not shown ever to have been reported to the Congress is not and cannot be such an authority, by implication, delegation or otherwise, as was contemplated by this Court in the *Pottorff, Sneeden* and *Rhodes* cases.

The various Acts of Congress, quoted in the petition and appendices thereto, relating to *Postal Savings Funds* are not applicable. While there at one time existed a *Postal Savings System* in the Canal Zone created September 8, 1911, by an executive order of President Taft such executive order made no provision for securing deposits of such postal savings funds and such system was abolished by an executive order of President Wilson dated Sept. 5, 1914 (Appendix A, hereto). The so-called "deposit money orders" issued under the executive order of President Wilson, the funds from which at closing constituted the deposits in question obviously could not have been covered by the circular of April 1, 1914, such circular having been issued before the system of deposit money orders was set up by President Wilson in September, 1914.

Since petitioner points to no authority, and there is none, authorizing a national bank to pledge its assets to secure deposits of Canal Zone Money Order Funds; and since petitioner points to no statute, and there is none, making it the duty of officers of the Canal Zone or the Secretary of War to exact security for safe keeping of Panama Money Order Funds deposited in national banks, the inescapable conclusion is that the pledging of assets by the District National Bank at the instance of the Secretary of War was *ultra*

vires, illegal and void *ab initio,* and that no rights flowed therefrom.

The United States is not an indispensable party.

As a reason for granting the writ petitioner urges that in holding the suit not to be one against the United States and in failing to regard the United States as an indispensable party, the Court below failed properly to apply the decisions of this Court.

Several fundamental misconceptions both of fact and of law render this reason for granting the writ invalid.

First, the argument proceeds throughout upon the explicit assumption that the faith of the United States is solemnly pledged to the repayment of the funds which were deposited in the District National Bank prior to closing and upon the further assumption that if this is correct, the United States Government is an indispensable party. Neither assumption is correct.

First, the references in the petition (footnote at p. 11) and the Act of Congress of February 16, 1934 (48 U. S. C. Sec. 1323 (a) quoted textually at pp. 20, 21 of the petition) deal exclusively with *postal savings funds,* whereas, as shown above, all the deposits here involved at closing were *money order funds* issued in the Panama Canal Zone regarding which there is no statutory pledge of repayment.

Second, and more important, even if the United States ultimately may have to make up any deficiency in Panama Canal Zone money order funds, such assumed fact would not make the United States an indispensable party. The same contention was made by the Solicitor General in *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, urging that "its (the government's) property rights would be directly affected if the relief sought were granted," but this Court rejected such contention, and said (at p. 567):

"The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts. Osborn v. Bank of United States 9 Wheat. 738, 842, 843, 6 L. ed. 204, 229; United States v. Lee, 106 U. S. 196, 213, 221, 27 L. ed. 171, 179, 182, 1 Sup. Ct. Rep. 240. The opposite notion left some traces in the law (1 Rolle, Abr. 95, Action sur Case, T.), but, for the most part, long has disappeared."

The next error on this point in the petition is the assumption that by suing Harry H. Woodring, Secretary of War, respondent is in reality suing the United States. In paragraph 5 (b) of the complaint (R. 2) it is specifically averred that the defendants, and each of them, are sued both in their individual and in their official capacities.

The next basic and erroneous assumption in the petition is the statement upon which the whole structure of the indispensable party argument is based, namely, that "though an officer has custody of property the Courts cannot compel him to surrender it in a proceeding in which the United States is not a party, if the property is in the possession of the United States as owner (See, *Ex rel. Goldberg* v. *Daniels,* 231 U. S. 218) or if the interest of the United States will be affected (*Belnap* v. *Schield,* 161 U. S. 10, 18, and *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601)."

The fundamental distinction overlooked is the distinction between the original deposits made by the Secretary

of War in the District National Bank and the money which the Secretary of War now has on deposit in the Hamilton National Bank which is sought to be recovered here. The money now on deposit in the Hamilton National Bank, which is the subject matter of this suit, admittedly represents the proceeds of respondent's bonds and, as has been shown above, the pledge being absolutely void, neither the United States nor anyone else became the owner or acquired any interest in the proceeds of such bonds.

United States ex rel. Goldberg v. *Daniels, supra,* was an action for mandamus to force the Secretary of the Navy to deliver to petitioner a United States cruiser, for which petitioner had bid at a sale, and obviously the United States Government was not only in possession but was the owner of such cruiser.

Belnap v. *Schield, supra,* was a suit for an injunction and for profits for the alleged infringement of a patent, the defendants being officers of the United States Navy. The suit was in effect one for damages against the United States. Even in such a case, however, the Court examined into the merits of the claim and found that the plaintiff had not suffered damages.

Similarly, *International Postal Supply Co.* v. *Bruce, supra,* was an action for an injunction against a United States Postmaster to restrain the use of certain stamp cancelling machines upon which the petitioner held a patent, and the Court based its opinion upon the decision in *Belnap* v. *Schield.* This Court in its opinion in *International Postal Supply Co.* v. *Bruce, supra,* clearly distinguished that case and *Belnap* v. *Schield,* from *United States* v. *Lee,* 106 U. S. 196, relied upon by respondent here, upon the ground that in the *Lee* case the United States did not own or have title to the property involved whereas in the *Belnap* case it did have such ownership and title. The distinction goes to the heart of the present case because here the ownership or title of the property involved was never in the United States, not only because ownership re-

mained always in respondent, but because the property involved was never covered into the Treasury of the United States and was never public money of the United States.

The petitioner seeks to draw a distinction based upon the fact that petitioner Woodring is not the person who originally obtained the property of respondent, but since admittedly petitioner's predecessor Dern, turned the property over to petitioner and petitioner holds the property in a bank account in the District of Columbia, the distinction fails.

The United States was not joined as a party defendant in the proceedings below for the reason that the respondent sued Harry H. Woodring and H. A. A. Smith, individually and officially, for the purpose of recovering the proceeds of the assets of the bank pledged to secure funds of the Panama Canal, and not for the purpose of recovering moneys of the United States in their possession or custody. The bill of complaint (R. 6, par. 9) averred that the funds claimed "are not moneys of the United States, are not part of revenues of the United States, are not subject to the control of the Secretary of the Treasury * * *".

Since the suit seeks recovery of specific private property (the proceeds received from the sale of the bank's assets) in the hands of the petitioner, the rule applies that where private money or property has been wrongfully taken or received, and where it is held by Government officials or agents, it may be recovered, and such a suit is not a suit against the United States and the United States is not an indispensable party.

United States v. *Lee*, 106 U. S. 196.
Osborn v. *Bank*, 9 Wheat. 738.
Tindal v. *Wesley*, 167 U. S. 204.
Lane, Sec'y of the Interior v. *Watts*, 234 U. S. 525.
Philadelphia County v. *Stimson*, 223 U. S. 605.
Sloan Shipyards Corp. v. *U. S. S. Bd. E. F. Corp.*, 258 U. S. 549, 566, 567.
Ervin v. *Quintanilla*, 99 Fed. (2d) 935-939.

Petitioner seeks to avoid the effect of the above decisions of this Court by reference to a few cases including *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452; *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 271; *Haskins Bro. & Co.* v. *Morgenthau*, 85 Fed. (2) 677, 683.

Cunningham v. *Macon, etc. RR. Co., supra*, involved the attempted foreclosure of a mortgage on property to which the Governor of Georgia and other officials held possession and title, and the Court distinguished the case from *United States* v. *Lee, supra*, for there the United States neither was in possession of the property nor had any interest in it.

Stanley v. *Schwalby, supra*, involved an action of trespass and the Court examined the merits and decided against the contention of plaintiffs. In making the distinction between the case at bar and the *Lee* case the Court stated (at 271):

> "And this Court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment of their officers."

Haskins Bros. et al. v. *Morgenthau, supra*, in which the opinion was written by the same Justice who wrote the opinion in the instant case, involved the attempted recovery of processing taxes which had been collected and *deposited in the United States Treasury* and thereby became "public moneys of the United States subject to withdrawal only by an Act of Congress * * *".

The very distinction now being made by respondent was thus made by the Court below in the last cited case.

Petitioners urge in their Argument (pet. p. 13 and footnotes) that the decree below was not a decree for restitution of the proceeds of the bonds, since the tracing of the *res*, if attempted, was merely a means of determining dam-

ages for a breach of trust, and that the decree was in substance merely a money judgment. In answer to this contention it should be stated that the form of decree resulted from the circumstances surrounding the sale of the illegally pledged assets, and that adjustments were required to be made as credits to petitioner (defendant below) by reason of dividends paid to general creditors, said adjustments being made as of the date of the payment of said dividends and as a result of computations made accordingly. The decree in the trial court was entered containing thereon the legend "no objection to the form" (R. 24), and signed in behalf of petitioner. No objection to such form may now be made. The decree could as well have directed restitution of the proceeds of the bonds, less the deduction of credits. The money judgment merely represents the amount of the liability of the petitioner to account to respondent as prayed in the bill. But since petitioner (defendant below) specifically found no objection to the form of the decree, he will not be heard to question it now.

CONCLUSION.

There being no novel question involved in this case and the decision of the lower court being in strict accord with applicable decisions of this Court, it is respectfully submitted that the petition on behalf of Harry H. Woodring and H. A. A. Smith, for writ of certiorari to the United States Court of Appeals for the District of Columbia, be denied.

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Justus S. Wardell,
Respondent.

APPENDIX A.

TO REPEAL THE EXECUTIVE ORDER OF SEPT. 8, 1911, ESTABLISHING THE POSTAL SAVINGS SYSTEM IN THE CANAL ZONE.

By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:

Section 1. The Executive Order of *September 8, 1911,* establishing the Postal Savings System in the Canal Zone, is hereby repealed: *Provided,* That accounts opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.

Section 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, *money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.*

Section 3. This order shall take effect from and after October 1, 1914.

WOODROW WILSON.

THE WHITE HOUSE, 5 September, 1914.

[No. 2040.]